United Nations **AT**

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 916

Case No. 997: DOUAJI

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Mayer Gabay, First Vice-President, presiding; Mr. Julio Barboza, Second Vice-President; Mr. Victor Yenyi Olungu;

Whereas, on 7 January 1998, Mary Elias Douaji, a former staff member of the United Nations, filed an application requesting the Tribunal:

"[To order:]

i. Reinstatement of Applicant to a post commensurate with her qualifications.

ii. [Consideration of] the period between 29 April 1993 and the date of her reinstatement as special leave with full pay.

iii. [Compensation to the] Applicant for the injury caused to her through the UN Secretary [sic] breach of commitment.

iv. Payment of counselling fees and secretarial works estimated at US$ 700."

Whereas the Respondent filed his answer on 31 August 1998;

Whereas the Applicant filed written observations on 10 March 1999;

Whereas the Applicant filed additional written observations on 20 March 1999;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations Disengagement Observer Force (UNDOF) in Damascus on 7 September 1981 on a one-month fixed-term contract, as a Clerk-Typist at the G-3 level. Her appointment was extended successively and, on 1 June 1984, was converted to a temporary indefinite appointment. She was promoted to the G-4 level, as Secretary, on 1 October 1987. On 31 August 1992, she separated from service pursuant to an agreed termination following the abolition of her post.

This matter arises out of relocating UNDOF headquarters. At a date not specified in the files, it was decided to abolish 33 out of 123 posts in Damascus, including that of the Applicant. A clerical post established in UNDOF outside of Damascus was offered to the Applicant, but she declined to be relocated out of Damascus. On 22 June 1992, the Applicant sought to accept the post previously offered to her. However, on 26 June 1992, the Applicant was advised that this post had already been filled. On 13 July 1992, the Applicant was employed on an interim basis with the Headquarters Personnel Section, pending the complete relocation of Headquarters out of Damascus. On 31 August 1992, the Applicant was separated from service for abolition of post and was paid a termination indemnity.

On 9 July 1992, the Applicant requested review of the decision to separate her from service. In the absence of a reply to her request for review, on 6 October 1992, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 22 April 1993. Its considerations and recommendation read, in part, as follows:

"Considerations

...

10. The Panel noted that Appellant had been offered another post in UNDOF, but had initially refused it. The Panel felt that the offer of the post fulfilled any obligation the Secretary-General had to her. Moreover, it did not find evidence that there was any element of prejudice in the decision to separate her.

Recommendation

11. Although the Panel concluded that Appellant did not have a legal claim on the Organization, in the light of UNAT Judgement # 290 (...), the Panel recommends that her name be retained by UNDOF Administration and she be given priority consideration for appointment to any future vacant post for which she is qualified."

On 29 April 1993, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed her as follows:

"The Secretary-General has examined your case in the light of the Board's report and accepted its recommendation. He has directed, accordingly, that your name be retained on the roster of candidates for employment by UNDOF Administration and that you be given priority consideration for appointment to any future vacant post for which you are qualified."

On 24 August 1993, the Applicant wrote to the Under-Secretary-General for Administration and Management, stating that the Secretary-General's decision of 29 April 1993 was not being implemented since she had not been re-employed by UNDOF despite existing vacancies and alleging that "they don't want to employ me saying that the Chief of the particular section where the vacancy is, does not like me (without knowing me personally)."

On 9 November 1993, the Principal Officer, Office of the Under-Secretary-General for Administration and Management, forwarded the Applicant's 24 August letter to the Chief, Field Personnel Section, Field Operations Division. In response, on 14 December 1993, the Chief Administrative Officer (CAO), UNDOF, advised as follows:

"...

2. In accordance with the Secretary-General's decision and instruction of 29 April 1993 that the name of [the Applicant] 'be retained on the roster of candidates for employment by UNDOF Administration and that [she] be given priority consideration for appointment to any future vacant post for which [she] is qualified', UNDOF has been consistently following the above instruction.

3. Please note that since the receipt of above instruction (June 1993), UNDOF has in fact employed only three clerical staff, one Procurement Clerk on fixed-term appointment and the other two, a Procurement Clerk and a Clerk-Typist for the General Services Section, on Special Service Agreement (SSA) ...

4. In the recruitment process, [the Applicant's] name was always among the candidates for the above-mentioned clerical positions. The Chiefs of Sections concerned were consistently requested to interview and as necessary test the candidates for the respective positions with due consideration given to the case of [the Applicant]. Since the Section Chiefs concerned are well familiar with [the Applicant], they did not find it necessary to call her in for the interview. On the basis of her personal qualities, as compared to the other candidates for the positions, [the Applicant] regrettably was considered to be less qualified.

5. In the light of the above, we wisl. to confirm that UNDOF will continue to retain [the Applicant's] name in the roster of candidates and that she would be given priority consideration to any future vacant post for which she may be considered most qualified. It is of course understood that she would be evaluated together with other candidates."

On 1 July 1996, the Applicant's counsel wrote to the Force Commander, UNDOF, alleging that the Secretary-General's direction that the Applicant be given priority consideration for employment had not been followed and further alleging that 30 vacancies for which she was qualified had been filled since June 1993.

On 15 August 1996, the Applicant's counsel wrote to the Secretary-General alleging that notwithstanding 30 suitable vacancies, the Applicant had not been re-employed by UNDOF.

On 27 August 1996, the CAO, UNDOF, advised the Applicant's counsel of the serious financial situation of the Organization and of the Secretary-General's decision to freeze recruitment with effect from September 1995. However, he assured the Applicant's counsel that "should the situation change and the employment of a locally recruited Secretary would be necessary, [the Applicant] will be given priority consideration."

On 17 September 1996, the Chief, Personnel Management and Support Service, Field Administration and Logistics Division (FALD), Department of Peace-keeping Operations (DPKO), forwarded the Applicant's counsel 15 August letter to the CAO, UNDOF, Damascus, and requested clarification concerning the issues raised in that letter. On 22 October 1996, the CAO, UNDOF, clarified that 14 vacancies were filled through local recruitment during the prior three years and that 12 of these posts were at the Applicant's G-4 level. He further noted that the Applicant "was considered together with other candidates for those positions for which she was considered qualified."

On 19 December 1996, the Applicant, through her counsel, requested the Secretary-General to ensure that his decision of 29 April 1993 be implemented as soon as possible. On 28 January 1997, a Human Resources Officer, Office of Human Resources Management (OHRM), replied, reassuring the Applicant that UNDOF would continue to retain the Applicant's name on UNDOF roster for priority consideration for any vacancies for which she is qualified, and pointing out that "only limited recruitment of local staff [had] taken place in UNDOF during the last three years". On 3 February 1997, the Chief, Personnel Management and Support Service, FALD, DPKO, requested the CAO, UNDOF, to ensure that the Applicant's name be retained on the roster of candidates "for consideration for vacancies for which she meets the required qualifications."

On 10 February 1997, the Applicant's counsel wrote to the Human Resources Officer, OHRM, requesting that the Applicant be re-employed as soon as possible. On 17 March 1997, the Applicant's counsel wrote to the CAO, UNDOF, asking what steps had been taken to reinstate the Applicant and noting that numerous other staff members with qualifications equal to those of the Applicant had been appointed since 1993.

On 22 April 1997, the Applicant lodged an appeal with the JAB, requesting the JAB to recommend, inter alia, the Applicant's re-employment with UNDOF.

On 24 July 1997, the Presiding Officer, JAB, informed the Applicant as follows:

> "...
>
> In your letter [of 22 April 1997], you referred to the failure on the part of UNDOF Administration to implement the Secretary-General's instructions as stated in his decision ... [that the Applicant] be 'given priority consideration for appointment to any future vacant post for which [she is] qualified' as the basis of this appeal.
>
> The above instruction cannot however be considered as an administrative decision under Chapter 11 of the Staff Rules. Consequently, I regret to inform you that your statement could not be received as an appeal."

On 2 August 1997, the Applicant's counsel wrote to the Presiding Officer, JAB, stating that the appeal against "the non-extension of priority for re-employment" was in line with Chapter XI of the Staff Rules. On 3 October 1997, the Secretary of the JAB confirmed that the case would not be considered by the JAB since it did "not meet the requirements for an appeal".

On 19 November 1997, the Applicant wrote to the Secretary of the JAB and, citing Judgement No. 821, Akkawi, requested that the case be filed with the JAB.

On 7 January 1998, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent failed to adhere to his own decision to give the Applicant priority consideration for appointment to vacant posts for which she is qualified.

2. The appeal was receivable before the JAB, and is receivable before the Tribunal.

3. Exceptional circumstances warrant a waiver of the time limits.

Whereas the Respondent's principal contentions are:

1. The application is not receivable before the Tribunal, as the requirements of article 7 of the Statute of the Administrative Tribunal are not fulfilled.

2. Should the Tribunal nevertheless decide to receive this application, the Respondent submits that the Applicant was fully considered in accordance with the terms of the Secretary-General's decision of 29 April 1993.

The Tribunal, having deliberated from 6 to 23 July 1999, now pronounces the following judgement:

I. UNDOF employed the Applicant as a Secretary in Damascus. In 1992, UNDOF headquarters was moved out of Damascus. The Applicant's post was abolished but the Applicant was offered a post at the new location. Initially, she refused the offer due to family reasons. When she later expressed interest in accepting the post, she was informed that it had already been filled. She was terminated with effect from 31 August 1992, and paid a termination indemnity. The Applicant filed an appeal with the JAB against the decision to separate her from service. The JAB concluded that the Applicant "did not have a legal claim on the Organization", but recommended that "her name be retained by UNDOF Administration and [that] she be given priority consideration for appointment to any future vacant post for which she is qualified."

The Secretary-General accepted the JAB's recommendation and informed her on 29 April 1993 that he had "directed ... that your name be retained on the roster of candidates for employment by UNDOF Administration and that you be given priority consideration for appointment to any future vacant post for which you are qualified."

The Respondent contends that the Applicant's name was retained on UNDOF's roster of candidates for suitable vacancies and that she was being given "priority consideration" for appointment to posts for which she was qualified.

III. On 15 August 1996, the Applicant's counsel requested the Secretary-General to take action to implement the Secretary-General's decision of 29 April 1993. On 27 August 1996, the CAO, UNDOF, informed the Applicant that due to a hiring freeze, she could not be given priority consideration at that time. On 19 December 1996, the Applicant's counsel again wrote to the Secretary-General, requesting that he take action to implement the decision of 29 April 1993. On 28 January 1997, the Human Resources Officer, Operational Services Division, OHRM, responded on behalf of the Secretary-General, noting that only limited recruitment of staff [had] taken place in UNDOF during the last three years and that [the Applicant's] name [had] been considered together with other candidates for those posts for which she appeared qualified." On 10 February 1997, the Applicant's counsel responded, stating that "a ban on recruitment should not have been a barrier to the specific instructions of the Secretary-General", and requested that the Applicant be reinstated as soon as possible. On 17 March 1997, the Applicant's counsel again wrote to the CAO, UNDOF, listing 17 staff members who had been recruited since the Secretary-General's decision of 29 April 1993, and alleging that the Applicant was equally qualified.

On 22 April 1997, the Applicant lodged an appeal with the JAB, seeking implementation of the Secretary-General's decision of 29 April 1993 to give the Applicant priority consideration for appointment to a future vacant post. No JAB was ever convened. Rather, on 24 July 1997, the Presiding Officer of the JAB wrote to the Applicant, stating that the Secretary-General's decision of 29 April 1993 "cannot ... be considered as an administrative decision under Chapter 11 of the Staff Rules" and that therefore "[the Applicant's] statement could not be received as an appeal." The Applicant, on 2 August 1997, responded by clarifying that the decision contested was the "non-extension of priority

for re-employment and/or reinstatement ..." On 3 October 1997, the Secretary of the JAB reiterated to the Applicant the Presiding Officer's position that the appeal was not receivable by the JAB.

IV. The Applicant thereafter filed the present application with the Tribunal. She seeks reinstatement to a post commensurate with her qualifications, and asks that the period between 29 April 1993 and the date of her reinstatement be treated as special leave with full pay. In addition, she requests compensation for injuries arising from the Secretary-General's alleged breach of his commitment.

V. The Tribunal must first determine whether the Applicant's case is receivable. Article 7(1) of the Statute of the Tribunal states that:

> "An application shall not be receivable unless the person concerned has previously submitted the dispute to the joint appeals body provided for in the Staff Regulations and the latter has communicated its opinion to the Secretary-General, except where the Secretary-General and the applicant have agreed to submit the application directly to the Administrative Tribunal."

VI. The Respondent submits that the application is not receivable because (1) the Secretary-General's decision of 29 April 1993 could not be considered an administrative decision under Chapter XI of the Staff Rules; (2) the Applicant's appeal to the JAB could not be considered as she, at no time, requested administrative review as a first step in the appeals process in accordance with staff rule 111.2 (a); (3) the Secretary-General did not communicate his final decision to the Applicant in this matter according to staff rule 111.2 (p); and (4) the Secretary-General has not agreed to submit the application directly to the Tribunal.

The Respondent's argument appears to be based on the incorrect premise that the Applicant was appealing against the Secretary-General's decision of 29 April 1993, by which

he had accepted the JAB's recommendation to retain the Applicant's name on a roster of candidates for employment and to give her priority consideration for future vacant posts for which she was qualified. It is clear that the Applicant is satisfied with that decision and seeks only to have it implemented. The "administrative decision" that she sought to challenge, first by writing to the Secretary-General and later by appealing to the JAB, was the Secretary-General's failure to take appropriate measures to implement his decision of 29 April 1993. The Tribunal notes that the Applicant tried, on more than one occasion, to request the Secretary-General to review the alleged failure to implement his decision. It appears that the Respondent did not reply to her final letter to the CAO, UNDOF, dated 17 March 1997, in which she alleged that numerous posts had been filled by individuals with qualifications similar to hers. Having received no reply to that 17 March letter, on 22 April 1997, the Applicant lodged an appeal with the JAB, against the Respondent's alleged failure, over the course of four years, to implement the 29 April 1993 decision.

The Presiding Officer of the JAB improperly rejected the Applicant's papers instituting an appeal. She, like the Respondent, incorrectly assumed that the decision that the Applicant was challenging was the 29 April 1993 decision, when in fact she was challenging the Administration's inaction in relation to the implementation of that decision. The JAB should have been convened to consider the Applicant's case and determine whether the Respondent was in fact properly implementing the 29 April 1993 decision. The JAB has considered similar cases in which a staff member has appealed the Secretary-General's failure to implement a prior promise to give the staff member "priority consideration" for a post or a promotion. (Cf. Judgements No. 444, Tortel (1989); No. 678, Lukas (1994); No. 706, Elahi (1995)).

VIII. The Tribunal finds that the Applicant was entitled to lodge an appeal with the JAB. Any other result would tie the hands of staff who wish to challenge the Administration's *failure* to implement decisions taken in their favour.

IX. In view of the foregoing, the Tribunal orders that:

(a) The case be remanded to the JAB for consideration on the merits;

(b) All other pleas are rejected.

(Signatures)

Mayer GABAY
First Vice-President, presiding

Julio BARBOZA
Second Vice-President

Victor YENYI OLUNGU
Member

Geneva, 23 July 1999

Maritza STRUYVENBERG
Executive Secretary